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NATIONAL LABOR RELATIONS BOARD

PURPLE COMMUNICATIONS, Employer, And COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, Charging Party/Petitioner.	Case Nos. 21-CA-095151; 21-RC-091531; 21-RC-091584 **CHARGING PARTY/PETITIONER'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE ON REMAND**

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PREFACE

The Charging Party maintains its position that the remand in this case from the Board, encompasses the use of email during work and non-work times. Although the Board created a presumption that employees may use the email during non-work time, the record in this case shows clearly that employees had access to and did use the email during work time just as the employer did so with respect to issues involving working conditions.

The Administrative Law Judge previously entered an Order cancelling the hearing based on the idea that the Board's remand was limited to the question of whether the employer could provide any business justification for limiting the use of the email during non-work time. We take the Board's recent Order of March 4 (granting the Motion for Special Permission to Appeal but denying it on the merits) to require the Administrative Law Judge to review the entire record to determine whether there are any special circumstances justifying limitations in the email during work and non-work time.[1]

In that regard, in this on remand, the employer has "represent[ed] that it will not contend that any special circumstances, as defined in the Board's decision . . . , exist to justify its electronic communications policy." *Purple Communications, Inc.*, 21-CA-095151 (March 4, 2015) (unpublished order). On that basis, the Board has held that the ALJ "reasonably determined that no additional evidence on this issue need be presented." *Ibid.* Because the Board has held that the ALJ need not reopen the record in this case on remand, the ALJ should thus "prepare a supplemental decision containing findings of fact, conclusions of law, and a recommended Order, consistent with [the Board's] Decision and Order," *Purple Communications, Inc.*, 361 NLRB No. 126, at slip op. 2, (hereinafter "*Purple Communications*" based on the existing record in this case.

The Board has interpreted the employer's letter attached to the ALJ's Order as disclaiming special circumstances at any time both work and non-work: "In light of Respondent's representation that it will not contend that special circumstances exist within the

[1] We request that the ALJ make part of the record, the Request for Special Permission to Appeal and the Board's Order granting the Motion but denying the appeal on its merits.

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meaning of the Board's Decision cited below, exist to justify its electronic communications policy, the judge reasonably determined that no further evidence on this issue need be presented." (footnote omitted) Thus the ALJ must find that no special circumstances exist to justify the policy during work or non-work time.

As we explain, that record shows that not only are there no special circumstances justifying Purple Communications' bar on employee use of company email on nonwork or work time for Section 7-protected messages – as the employer now acknowledges – but also that the company actually *allowed* employee use of its email system for nonbusiness communications, including for Section 7-protected messages in opposition to the union.

In the supplemental decision, the ALJ should include specific factual findings that Purple Communications permitted employees to use company email for nonbusiness (but work related) communications, including for Section 7-protected messages in opposition to the union. This is important because the Board mistakenly stated in its decision that "[t]he record is sparse regarding the extent to which the interpreters have used the Respondent's email for nonbusiness purposes," *Purple Communications, Inc.*, 361 NLRB No. 126, at Slip Op. p. 3, and, in particular, appears unaware of the clear record evidence of Purple Communications permitting employee use of its email system to solicit opposition to the union. The Board made this comment although the ALJ did note the use by VIs of email during work times for both soliciting opposition to the Union and addressing this conduct to management. *Purple Communication*, Slip Op. p 64-65 (ALJ Decision) (describing use of email by employees). This have been based its mistaken impression of the record evidence on the fact that the ALJ did not address employee nonbusiness use of company email resolving the *Register-Guard,* 351 NLRB 1110 (2007) issue in his original decision. The ALJ should explain that the reason such evidence was not described in his original decision was because the argument that Purple Communication's electronic communications policy was unlawful was barred as a matter of law by *Register-Guard*, 351 NLRB 1110 (2007), such that it was unnecessary at that time for the ALJ to make specific factual findings regarding employee nonbusiness use of company email.

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In particular, the ALJ should now make factual findings regarding Respondent Exhibit 8, which contains messages sent to and from Purple Communications employees using company e-mail to seek support for an anti-union statement. *See* Resp. Ex. 8, unnumbered p. 4 (e-mail from marie.treacy@purple.us to renee.souleret@purple.us); unnumbered p. 7 (e-mail from mary.dettorre@purple.us to renee.souleret@purple.us). The employees presented this statement with its attached emails to Purple Communications, Resp. Ex. 8, unmarked p. 1 (cover letter addressing statement to company representatives); Tr. 135-37, so Purple Communications was aware of this use of its email system by its employees for the nonbusiness and Section 7-protected purpose of soliciting opposition to the union. In fact, Purple Communications provided copies of these e-mails to the ALJ as an exhibit in the hearing in this case.

In addition, the ALJ should find, based on the existing record, that employee nonbusiness use of company email was routine and tolerated by Purple Communications. In addition to Respondent Exhibit 8, the record contains evidence, as the ALJ previously found, that "[e]mployees routinely use the work e-mail system to communicate with each other." *Purple Communications*, Slip Op. p 62 9zz9 ALJ Decision). *See also* Tr. 26, 47. In addition, "interpreters can access [their company email] accounts . . . from their home computers and smart phones" as well as from "shared computers that are located in common areas" where employees take breaks. *Ibid. See also* Tr. 27, 49-50, 211. Finally, the company provided no evidence of any employee ever being disciplined for violating its electronic communications policy. Tr. 309-10. On the basis of these three undisputed facts – routine employee use of company email to communicate with one another, unlimited employee access to company email on nonwork time including in break rooms and from home and during work time when not otherwise engaged in interpreting for a client, and the fact that no employee was ever disciplined for nonbusiness use of company email – the ALJ should draw the reasonable inference that employee nonbusiness use of Purple Communications' email system was routine and tolerated by the company.

In conclusion, not only does Purple Communications concede that there are no special circumstances justifying its electronic communications policy's bar on employee use of company

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email for Section 7-protected messages during nonwork and work time, but the record in this case clearly demonstrates that Purple Communications was aware of and tolerated routine employee use of company email for nonbusiness purposes, including for Section 7-protected messages in opposition to the union. The ALJ should include such specific factual findings in his supplemental decision.

In this brief, we will emphasize the use of the email system during work time. This will in our view prove our point that these employees have routine access to the email during work time and may use it for protected concerted activity or Union related matters during work time provided the employer is unable to demonstrate any substantial business justification to prohibit use at the time it is in use by the video relay interpreter. We will highlight those facts below. See in particular Part II C. We believe that the record will show that the employer allows use of the email system during all times when the employees are at the worksite both work time and non-work time.[2] Thus there are no special circumstances or justification to limit the use of the email during work or non-work time on this record.[3].

[2] The ALJ has already found that VIs have 10 minutes per hour when they don't have to be interpreting but which is work time for which they are paid. *Purple Communications,* Slip Op. p 65. This is work time during which Vis are free to use the internet or intranet for email purposes.

[3] The ALJ need not reach the question of whether the employer could limit the use of the email in all circumstances when the VI is interpreting with a client. The employer has not asserted this as a special circumstance and it has not occurred on this record.

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I. INTRODUCTION

Purple Communications is involved in a specialized portion of the communications industry. It facilitates communication between the deaf and hard of hearing and others through Video Relay Interpreted Services. The Federal Communications Commission finances and controls this program known as the Telecommunications Relay Service ("TRS"). It describes VRS as follows:

> VRS, like other forms of TRS, allows persons who are deaf or hard-of-hearing to communicate through the telephone system with hearing persons. The VRS caller, using a television or a computer with a video camera device and a broadband (high speed) Internet connection, contacts a VRS CA, who is a qualified sign language interpreter. They communicate with each other in sign language through a video link. The VRS CA then places a telephone call to the party the VRS user wishes to call. The VRS CA relays the conversation back and forth between the parties -- in sign language with the VRS user, and by voice with the called party. No typing or text is involved. A voice telephone user can also initiate a VRS call by calling a VRS center, usually through a toll-free number.
>
> The VRS CA can be reached through the VRS provider's Internet site, or through video equipment attached to a television. Currently, around ten providers offer VRS. Like all TRS calls, VRS is free to the caller. VRS providers are compensated for their costs from the Interstate TRS Fund, which the Federal Communications Commission (FCC) oversees.

(http://www.fcc.gov/guides/video-relay-services.)[4]

The question before the Administrative Law Judge involves the right of employees to communicate using email. Under the National Labor Relations Act, Purple should be required to allow its employees to communicate among themselves or with others regarding wages, hours and working conditions using the employer's email communications systems, subject to specific limits discussed below. The ALJ should find that employees have the right to use email during

[4] This service is one form of the services offered by Telecommunications Relay Service, which assists persons with hearing or speech disabilities to communicate. *See* http://www.fcc.gov/encyclopedia/telecommunications-relay-services-trs. These services are all part of a broad effort by the FCC to provide communications services to various disability communities. Text-to-Voice, Speech-to-Speech and Voice Carry Over are examples of these services.

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work time for communication about working conditions. Because they have that right during working hours, they should have that right during non-work time.

II. PURPLE'S OPERATIONS

As described by the FCC website and Purple's website, VRS provides interpretive services using American Sign Language for customers who have hearing impairments (either hard of hearing or deaf). Purple's services are displayed on its website. https://www.purple.us/contactus?mID=68. See also Board Decision at p 2.

A. THE NATURE OF PURPLE'S VRS SERVICES

Purple operates call centers, which are open 24 hours a day, 7 days a week, 365 days a year (Tr. 250), as required by the FCC rules. Purple operates sixteen call centers (Tr. 250), although it makes no difference where they are physically located because of the requirement that the calls be routed in the order they are received. The video interpreters (VIs) in the two centers involved, Corona and Long Beach, work in shifts; so, although there are 42 (Long Beach) or 31 (Corona) employees, a small percentage of them work at any time in order for Purple to maintain enough shifts to operate the centers 24/7.

The client uses a 10 digit phone number and calls in to access those services. Under the FCC rules, the calls must be handled in the order in which they are received and are to be responded to within 120 seconds of receiving the call. Purple has implemented a Queue system so it can monitor when the calls are backing up past the 120 seconds mandate imposed by the FCC. (Tr. 154.)

The client is seen on a video screen, and the client must have similar video screen capability.[5] Clients and Purple have proprietary equipment and software used to process the calls. (Tr. 46.) All of this is done on the Internet through high speed lines. VIs who work for Purple are certified according to industry standards established by a national organization of such interpreters. (http://www.rid.org/. Tr. 270-71.) The hearing impaired are equally well-organized and have their own advocacy organizations. (http://www.nad.org/.)

[5] The service is detailed on Purple's website: https://www.purple.us/usernotice.

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B. THE THREE DIFFERENT TYPES OF COMMUNICATION SYSTEMS USED BY THE INTERPRETERS

Each VI is provided an email address, [xxx]@purple.us. (Tr. 26, 47.) Interpreters use the email every day. (Tr. 48, 129.) Clients must provide an email address to use Purple's services. https://www.purple.us/register/default.aspx.

There are three different computer terminals used by the VIs: (1) computers at their workstations, (2) a computer maintained in a central portion of the office, known as the Queue computer, and (3) a terminal in the lunch or break rooms. The email communication systems made available by Purple to its VIs in each of those settings are as follows:

Workstation: There is limited internet access, and it is used only for the purposes of signing on by the VIs. VIs have access to Purple's Intranet at their workstations. (Tr. 25.) In addition, VIs have a phone connection to use to talk to third parties with whom the communication is made for the hearing impaired client. The VIs use the computer to connect with the video screen at the client's location. VIs also have games available that are already loaded into the computer system. (Tr. 46.)

QUEUE: This is a computer located in the center part of the office. This computer has Internet Explorer access to the internet. AOL Messenger is constantly on, and this computer is generally used for communicating operations through AOL Messenger. The interpreters all have access to Internet Explorer on this terminal.

The Break Room: In each of the centers (Tr. 27, 50), there is a computer available to the employees in the break room to which there is Internet access. The company intranet is available as well as other programs, such as Microsoft Word. (Tr. 27.)

Personal Computers or Cell Phones: VIs can access their email from their personal PDAs or other devices. (Tr. 10, 204-05 and 210.)

C. THE USE OF PURPLE'S COMMUNICATIONS EQUIPMENT.

(1) **Email**. The email system, which is available to all the employees, has been used by employees to communicate on issues of working conditions. (Tr. 64.) Managers will often respond to employee emails on the weekend. (Tr. 141.) The VIs have access to their emails on

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their personal devices and use it anytime, 24/7. (Tr. 204-05 and 210.) Management similarly uses the email during non-work hours. (Tr. 204-206, 211.) VIs used email during the campaign to circulate an anti-organization petition. (Tr. 71.) VIs advised management of the petition and asked management to stop its circulation. (Tr. 76-79 and 192.) One manager responded to the inquiry regarding the petition. (Tr. 193.) As noted, the employees have access from their personal devices of the company email and have used it. (Tr. 10 and 211.)

Purple uses the email system to send memos to the interpreters regarding working condition issues. (Tr. 132. *See also*, Emp. Ex. 10 [key metric adjustment memo to all video interpreters] and Ch. P. Ex 7 [announcing bonus].) Purple also has a newsletter that it sends through the company email to the employees. (Tr. 238.) The President of the company testified that the email was used during the representation election campaign. (Tr. 303-04.) The Hostess bankruptcy was the subject of "commuique" among VIs and management. (Tr. 272.) When describing communications between employees, it is apparent that when the word "talk" is used, Purple is referring to the use of the email. (Tr. 207.)

Purple, in order to encourage communications, has an open door policy. (Jt. Ex. 1 at p. 29.) Because the headquarters are located in a remote location in Rocklin, California, it is apparent that these open door communications are encouraged to be accessed by email since employees can't communicate with the President or the Human Relations Department except by email or by phone.

During the election campaign, Purple admitted the lack of communication and the necessity of communication among the employees. Employer CEO John Ferron used the term "communication" repeatedly in captive audience meetings. He complained repeatedly about the lack of communication and said that Purple would encourage more communication in an effort to improve the workplace. (Tr. 273, 278.)

(2) **Internet**. VIs have unlimited access to the internet in the break room and the Queue computer.

(3) **Intranet**. Human Resources material is available on the intranet. It is available at the workstation and in the break room. (Tr. 25 and 27.)

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(4) **Social Media**. Although not the subject of the hearing, Purple also relies on various social media services. There is no limitation on employee access to such sites at any time.

(5) **Phone**. The company rules allow limited personal use of the phone up to three minutes a call. (*See* Employee Handbook, Jt. Ex. 1 at p. 29 [prohibiting making or accepting personal telephone calls, including cell phone calls, of more than three minutes in duration during working hours, except in cases of emergency].) This policy does not prohibit employees from using their cell phones, including, presumably, emails or text messaging. Similarly, if an employee is hearing impaired, the employee is specifically permitted to use "relay" in the "normal course of your business" to make that "personal" call. (Jt. Ex. 1 at p. 33.)

D. THE USE OF EMAIL FOR NON-BUINESS BUT WORK RELATED PURPOSES

In particular, the ALJ should now make factual findings regarding Respondent Exhibit 8, which contains messages sent to and from Purple Communications employees using company e-mail to seek support for an anti-union statement. See Resp. Ex. 8, unnumbered p. 4 (e-mail from marie.treacy@purple.us to renee.souleret@purple.us); unnumbered p. 7 (e-mail from mary.dettorre@purple.us to renee.souleret@purple.us). The employees presented this statement with its attached emails to Purple Communications, Resp. Ex. 8, unmarked p. 1 (cover letter addressing statement to company representatives); Tr. 135-37, so Purple Communications was aware of this use of its email system by its employees for the nonbusiness and Section 7-protected purpose of soliciting opposition to the union. In fact, Purple Communications provided copies of these e-mails to the ALJ as an exhibit in the hearing in this case.

The email exchange represent in. Resp. Ex. 8 and 4, consisting of numerous emails between employees was sent in many instances during the day presumably during working hours.[6]

[6] We don't know whether the VIs were on work time but it is clear this is during working hours during the day. (10:13 a.m; 3:18 p.m.; 10:34 a.m.; 10:38 a.m.; 8:04 a.m.; 7:33 a.m.; 8:20 a.m., 8:21 a.m. and 3:41 p.m.). Mr. LoParo and Ms. Kroger both testified that their emails were sent from work during working hours.

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Most evident is the email from Judith Kroger, a Union supporter, to her manager complaining about the anti-union activity during work time. See Resp. Ex 4 (email dated November 14, 2012) Her supervisor responded later that day and Ms. Kroger immediately thanked him *Id*. Ms. Kroger testified that she sent that email during work time to complain about the activity going on at the worksite. (Tr.191-92). This was an evident use of the email for work related purposes which illustrates our point about the use of email by employees during work hours with apparent approval by management.[7]

The same use of the email was made by Mr. LoParo. He emailed his supervisor who responded about anti-union activity. This activity was found by the ALJ. . *Purple Communications* Slip Op. p. 65. (ALJ Decision) (Tr. 76-82).

In addition, the ALJ should find, based on the existing record, that employee nonbusiness[8] use of company email was routine and tolerated by Purple Communications. In addition to Respondent Exhibits 8 and 4, the record contains evidence, as the ALJ previously found, that "[e]mployees routinely use the work e-mail system to communicate with each other." Purple Communications, Slip Op. p 62 (ALJ Decision). See also Tr. 26, 47. In addition, "interpreters can access [their company email] accounts . . . from their home computers and smart phones" as well as from "shared computers that are located in common areas" where employees take breaks. Ibid. See also Tr. 27, 49-50, 211. Finally, the company provided no evidence of any employee ever being disciplined for violating its electronic communications policy. Tr. 309-10. On the basis of these three undisputed facts – routine employee use of company email to communicate with one another, unlimited employee access to company email on nonwork time including in break rooms and from home, and the fact that no employee was

[7] The ALJ described this in some detail. *Purple Communications*, Slip Op. p 64. (ALJ Decision)

[8] "Nonbusiness" means work related in some circumstances. Non-business in this context includes the anti-union emails as well as the email from one worker questioning the anti-union emails. All of these were work related and certainly were well within activity for "mutual aid or protection." To be clear they also were not "personal" in the sense that they were unrelated to work issues such as emails about soccer, church or social events. As nogted above Purple does explicitly allow use of phones for personal purposes. The rule at issues does no allow "uninvited email of a personal nature' so presumably it allows invited emails meaning email exchanges of a personal nature.

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ever disciplined for nonbusiness use of company email – the ALJ should draw the reasonable inference that employee nonbusiness use of Purple Communications' email system was routine and tolerated by the company.

E. THE RULE THAT IS BEFORE THE ALJ

The ALJ is asked to evaluate the following rule in light of the context in which the interpreters work.

The primary rule that is at issue states:

> Employees are strictly prohibited from using the computer, internet, voicemail and email systems and other Company equipment in connection with any of the following activities:
>
> 2. Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the company.
>
> 5 Sending uninvited email of a personal nature.

(Jt. Ex. 1 at p. 30-31.)

F. PURPLE'S BUSINESS MODEL CREATES PERIODS OF TIME WHEN VIDEO INTERPRETERS ARE NOT ENGAGED IN PRODUCTION, WHICH IS RESPONDING TO CALLS AND INTEPRETING USING PURPLE'S COMMUNICATION SYSTEMS.

VIs have limited periods of time during the work day when they are not engaged in "production," meaning answering calls from clients and interpreting for them using the communications services. In order for the ALJ to properly evaluate the availability and use of email in this workplace, we describe this below.

VIs process calls during a period that is somewhat less than 100% of their "work time." VIs are expected to be logged in only 80% of their time for core hours and 85% for non-core hours. (Tr. 85-86.) Log-in means that the VI is "to be sitting in your chair, logged into the system waiting for calls to come in." (Tr. 86.) The VI only has to be processing calls 55% of the shift. This is billable time for which the FCC is billed by the minute, so the more processing time, the Purple is reimbursed. The processing time is the critical metric for reimbursement and the business model. (Tr. 42, 85, 86.) These metrics had increased before the organizing and then changed again just before the election. (Tr., 85-88.) Purple implemented a "High Traffic Fail

Safe" (Em. Ex. 9), which reduced the expected log-in time when utilization met high traffic conditions. Even under these metrics, VIs were expected to be interpreting 55% of the shift (132 minutes out of 240 minutes), which would be reduced during the remainder of the 8 hour shift to 46% (122 minutes out of 240 minutes).

It is apparent that between the log-in time and the actual processing time, there are periods of time "in between calls." (Tr. 107 and 172.) There is no evidence in the record that their activities are restricted when they are logged-in but not on a call. Presumably, when they start the call by reaching out to the client, they must be at the work station using the computer and be prepared to complete the phone hook up. There is no evidence of any limitation on activities during this non-productive time.

This work schedule means that VIs are actually working, that means interpreting, for approximately 50% of the time that they are in the facility. For approximately 15% to 20% of the time, they are not actually logged in and thus have no responsibility for video interpreting.

The VIs are entitled to a 10 minute break every four hours as provided for by Purple policy. (Jt. Ex 1, p 21.) During this break period they are paid and do not have to log out of their computers. (Tr. 74.)[9] In California, this is also state law. (*See* IWC Order 4, Section 11.) Under California law, the employee is not forced to take a break, it must be available.

Employees are also entitled to a 30 to 60 minute meal period during which they are relieved of all duty. (Jt. Ex 1, p 21.) The VIs log out, and they are not paid for that time. In California, this is also state law. (*Id*. at p. 21. Cal. Lab. Code Section 512; IWC Order 4, Section 12.)

The amount of actual interpreting time, processing time and log-in in time are limited because of ergonomic concerns. (Tr. 253, 298.) Purple expects each of the VIs to take a 10 minute break each hour from interpreting with clients. (Tr. 75.) Presumably this is "free time"

[9] The ALJ has already found that VIs have 10 minutes per hour when they don't have to be interpreting but which is work time for which they are paid. *Purple Communications,* Slip Op. p 65. This is work time during which Vis are free to use the internet or intranet for email purposes.

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when they can read, talk with other VIs or engage in non-interpreting activity not involving the use of the interpreting communication equipment.

Finally, in order to encourage VIs to work more efficiently, the company maintains a bonus system that is based upon the amount of processing time. (Tr. 161.)

Although work time is defined from when the employee logs in until when the VI logs out, the business model is designed to permit a portion of time in several blocks and/or each hour when the VIs are not actually working. They are paid for this time but are free to leave their workstations or remain at their work stations and are free to engage in communications with other interpreters or managers or use their email, the phones[10] or the internet. They are free to go to the break rooms. The company maintains a minimum standard processing time that allows some remaining time that is paid and that is work time but which does not require interpreting.

There are workplaces where this is common. Truck drivers wait for a dispatch. Machine operators wait while material is delivered. Assembly line workers wait for the next batch of product. There are times during any work time when employees are not engaged in direct production.

III. ARGUMENT

A. ELECTRONIC COMMUNICATIONS SYSTEMS MAINTAINED BY PURPLE SHOULD BE AVAILABLE TO EMPLOYEES TO COMMUNICATE FOR PROTECTED CONCERTED ACTIVITY AND UNION ACTIVITY.

In summary, where an employer such as Purple generally allows employees access to an email system, the law should create a presumption that such use allows for communication of matters relating to working conditions, including relating to efforts to form, join or assist a labor organization or for mutual aid and protection within the meaning of Section 7. Such a presumption could be rebutted by an employer who expressly limits the email system to specific and defined business uses or limits and demonstrates that it strictly enforces such a rule. Where such business uses include matters of wages, hours or working conditions, employees may use

[10] Purple's phone rule allows personal calls up to three minutes. Jt. Ex. 1, p 28-29.

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such communication systems for communications relating to working conditions.[11] We believe this is a practical approach that accommodates employer interests and the Section 7 rights of employees under the Act. We believe the Board's Decision in *Purple* does this.

As a corollary, where the employer such as Purple allows any personal use of the email, meaning non-work related[12] use, the employees may use the email for communication about efforts to form, join or assist a labor organization or for mutual aid or protection. Here *Purple* does this by creating a presumption that during all non-work time the employee may use the electronic systems without restriction for protected concerted activity or union activity. Here Purple additionally does this by prohibiting only "uninvited email of a personal nature." Jt Ex 1 p 30-31. By allowing personal email which is unrelated to work at all times, work and nonwork,. It has no justification to limit email about work place issues.

Although this case involves email this will should apply generally to employer communication systems. There is some difference between access through a company provided computer terminal at work and employee provided electronic device either of which can access email or other communication systems. The principles of access and use that Section 7 seeks to protect are, however, the same. We address concerns attempting to encompass the broad array of such systems.

B. WELL-SETTLED PRINCIPLES GOVERN THE RIGHTS OF EMPLOYEES TO COMMUNICATE IN THE WORKPLACE.

Well-settled National Labor Relations Act principles regarding employee workplace communications entail the following conclusions regarding employee communications *via* email:

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[11] One variant of the restriction would be an email system on an intranet where the employees would receive emails and not have access to sending emails. In those cases, the employer would not have opened up the email system to general use.

[12] We use the term "work related" rather than "business related." The term business is ambiguous since employees could reasonably interpret "business related" to exclude communications about wages, hours and working conditions. The Board uses the term "work" in other contexts and it follows the statutory language that recognizes "work" and "working." 29 U.S.C. sections 142 (2); 143; 151, 152 (3); 152 (12); 158(b)(4)(D); 158(g). "Work" thus encompasses both business issues that may not related to wages, hours and other conditions of employment as well as those that do. Of course, if the employer prohibits any communications specifically about working conditions, that would not be permissible.

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First, where employees are allowed to communicate with one another about nonwork related matters, meaning personal matters, through a company's email system, employees have an NLRA-protected right to use the email system to communicate with one another about union or other matters of mutual aid or protection so long as the communication is concerted. *Second*, the employer may restrict such email, if the email constitutes solicitation, to nonworking time, and it may impose additional restrictions on such communications only if the restriction is justified by a showing that it is necessary to further substantial managerial interests. *Third*, in no event can an employer take adverse action against an employee, nor limit such communication, based on the ground that the employee's email communications concerned union or other concerted, protected matters related to mutual aid or protection.

The NLRA principles regarding the right of employees to communicate with one another at their workplace regarding union and other matters of mutual aid and protection were summarized and explained by the Supreme Court in *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), and *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

Beth Israel described the basic analytical framework for determining whether employer restrictions on employees' workplace communications constitute unlawful interference with the exercise of Section 7 rights:

[T]he right of employees to self-organize and bargain collectively established by § 7 of the NLRA, 29 U.S.C. § 157, necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), articulated the broad legal principle which must govern the Board's enforcement of this right in the myriad factual situations in which it is sought to be exercised:

> "[The Board must adjust] the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee." *Id.*, at 797-798.

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That principle was further developed in NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), where the Court stated:

> "Accommodation between [employee-organization rights and employer-property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other." *Id*., at 112.

Beth Israel Hospital, 437 U.S. at 491-492 (footnote omitted).

Eastex, in turn, explained that, since "employees are already rightfully on the employer's property, . . . it is the employer's management interests rather than its property interests that primarily are implicated" by employee workplace communications. *Eastex*, 437 U.S. at 573 (quotation marks, citation and brackets omitted). It follows that, to justify the suppression of such communications, an employer must "show that its management interests would be prejudiced" to a sufficient degree to justify the suppression. *Ibid*.

In sum, under the NLRA, "[n]o restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

We recognize, further, that an employer may limit use of the email to strictly business related purposes where it establishes such a clear rule and strictly enforces the rule. This accommodation recognizes that there may be managerial reasons to limit communications. For example, in the hospital setting, discussions in front of patients or in patient care areas may be limited. An employer could limit email use only to communications with customers or for a specific purpose such as checking on the status of orders. Similarly, in a retail setting, discussion can be limited on the sales floor in front of customers. VIs cannot be communicating with others while interpreting in front of clients on the video screen. But, like every such substantial managerial interest, it must be narrowly applied and subject to a substantial managerial interest. We submit that any employer who wants to implement and enforce such a rule should carry the burden of establishing that it promulgated such a clear rule and enforced it. Proof of enforcement falls upon the party that has access to the records to prove this. The employer can

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retain emails for a reasonable period of time and will likely do so in a context where it has such a managerial interest. Employees are not likely to save all emails, and employers do so as matter of course. Finally, we think this is practical. When employees communicate about work related issues, they often mix in personal matters. We just don't think, and neither will the Board agree, that it is likely that any employer that allows email use will strictly enforce any rule against any communication on all non-work related matters. But with resect to oral communications by phone, in person, Skype, 2-way radio or any other system, personal remarks and communications, either standing alone or in conjunction with work related communications, are the rule and the accepted norm for workplace communications. Purple does not so limit the use and this perfectly illustrates the point.

C. THESE PRINCIPLES APPLIED IN THE EMAIL AND COMMUNICATION SYSTEM CONTEXT

To put the foregoing general principles into the email context: Where an employer such as Purple allows employees to use the company's email system to communicate with each other on workplace matters generally (and this applies where they are allowed to communicate on personal matters unrelated to workplace issues), the "employees are already rightfully on the employer's property" in the sense of having been allowed access to the email system. *Eastex*, 437 U.S. at 573. And, "[e]ven if the mere distribution by employees of [email messages] protected by § 7 can be said to intrude on [the employer's] property rights in any meaningful sense, the degree of intrusion does not vary with the content of the [email]." *Ibid*. Thus, "it is the employer's management interests rather than its property interests that primarily are implicated" in the choice of nonbusiness matters about which employees may communicate *via* email. *Ibid*.

In such workplaces, a rule prohibiting employees from using email to communicate with each other about union or other matters of mutual aid or protection is most certainly a "restriction . . . on the employees' right to discuss self-organization among themselves." *Babcock & Wilcox*, 351 U.S. at 113. Such a rule violates § 8(a)(1)'s proscription of employer "interfere[nce] with . . . the exercise of the rights guaranteed in section 7," 29 U.S.C. § 158(a)(1), "unless the employer

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can demonstrate that a restriction is *necessary* to maintain production or discipline." *Babcock & Wilcox*, 351 U.S. at 109 and 113 (emphasis added).

D. EMPLOYERS MAY IMPLEMENT SPECIFIC RULES LIMITING EMAIL TO DEFINED BUSINESS PURPOSES IF THEY STRICTLY ENFORCE THOSE RULES; EMPLOYERS MAY IMPLEMENT NON-DISCRIMINATORY RULES LIMITING SOLICITATION DURING WORKTIME.

This is not to say that employees are always entitled to use their employers' email systems for Section 7-protected communications, nor does it mean that employers are prohibited from maintaining reasonable non-discriminatory rules regarding employee use of company email.

Where an employer *altogether* denies employees the right to use a company email system for any communications, employees have no right to use that system for Section 7-communications relating to wages, hours and conditions of employment. *Purple* does not as the Board recognized. Slip Op. p 3.

Just as an employer is not required to provide employees with access to its email system at all, if an employer maintains and strictly enforces a rule limiting use of the email to a specific business purpose (such as contacting customers, forwarding medical records or other business records or dispatchers or schedulers), it need not permit employees to use that system for union-related solicitation, even during non-work time. In contrast, as we have explained, once an employer creates an "avenue[] of communication open to [employees] . . . for the interchange of ideas," *LeTourneau*, 54 NLRB at 1260, by permitting employees to use its email system for communications, it may not deny employees the right to use that system for Section 7-protected communications as well. Of course, where the communications system is open to use for personal purposes unrelated to work, the employer cannot limit the nature of the communication if concerning issues of wages, hours and conditions of employment for mutual aid or protection. *Purple* does not so limit the use of email by VI's. Moreover the employer has declined to present any evidence of such limitations.

The rationale for this sensible rule is that, pursuant to the logic of the Supreme Court's decision in *Eastex*, an employer may rest on its managerial interest in its email system only to

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decide: (1) whether to provide employees with access to its email system at all; and to then exercise its managerial interests (2) whether to permit employees to use that email system for non-work purposes. Once "employees are already rightfully on the employer's property" – by means of the employer providing employees with access to its email system and permitting non-work use of that system – "it is the employer's *management interests* rather than its property interests that primarily are implicated." *Eastex*, 437 U.S. at 573 (quotation marks and brackets omitted) (emphasis added).

In other words, the act of employees sending emails regarding issues of mutual aid and protection with which the employer disagrees does not cause "an injury to the company's interest in its computers – which worked as intended and were unharmed by the communications – any more than the personal distress caused by reading an unpleasant letter would be an injury to the recipient's mailbox, or the loss of privacy caused by an intrusive telephone call would be an injury to the recipient's telephone equipment." *Intel Corp. v. Hamidi*, 71 F.3d 296, 300 (Cal. 2003). Thus, as between personal emails, whose content is not protected by the NLRA, and Section 7-protected emails, "the degree of intrusion [into the employer's property rights] does not vary with the content of the material." *Eastex*, 437 U.S. at 573.

Although an employer that permits employees to use its email system cannot prohibit employees from using that system for Section 7-protected communications, the employer can enforce reasonable non-discriminatory rules regarding employee use of a company email system, as long as those rules do not interfere with the ability of employees to use the company email system to engage in solicitation during non-work time.

Having said that much, it is also true that a general nondiscriminatory rule limiting employees' communications that are solicitations to nonwork time is valid on its face and may be applied to email communications as to other communications. This follows from the fact that "[w]orking time is for work" so that "a rule prohibiting union solicitation during working hours . . . must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose." *Republic Aviation*, 324 U.S. at 803 n. 10. By the same token, because "time outside working hours . . . is an employee's time to use as he wishes without unreasonable

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restraint, . . . a rule prohibiting union solicitation by an employee outside of working hours, although on company property[,] . . . must be presumed to be an unreasonable impediment to self-organization . . . in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." *Republic Aviation,* 324 U.S. at 803-804 n. 10. Thus, to justify restrictions on employee email communications concerning union or other concerted, protected matters during *non*work time, the employer must show "special circumstances" that "make the rule necessary."[13]

Furthermore consistent with *United Steelworkers v NLRB (Nutone*), 357 U.S. 357 (1958), we could imagine an employer setting up a one way captive audience meeting where it did blast emails requiring employees to read but not respond directly at that time. But if employees had otherwise access to email, the principles discussed here would not prevent further communication and discussion.[14]

An employer also could lawfully prohibit employees from sending abusive and threatening email messages on the company email system, as long as such a rule is not applied in a manner that interferes with employees' right to engage in Section 7-protected communications. "[A] rule prohibiting 'abusive language' is not unlawful on its face," rather "[t]he question of whether particular employee activity involving verbal abuse or profanity is protected by Section 7 turns on the specific facts of each case." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). *See Costco Wholesale Warehouse*, 358 NLRB No. 106 at page 2 (2012). Communications that are "malicious, abusive or unlawful: would not be protected. *Id*., citing

[13] We recognize that, as a practical matter, an employee who sends an email containing a solicitation or a non-business related matter may not know whether the recipient is working. Relatedly, a recipient who is on work time may not be able to discern whether an email contains a solicitation or a non-business related matter without opening it. For these reasons, an employer who chooses to limit the use of company email for solicitation to non-work time or strictly limit the use of email to business purposes must reasonably account, in a non-discriminatory manner, for these idiosyncrasies of email communication.

[14] *Virginia Concrete Corp*., 338 NLRB 1182, 1187 (2003) (one way text messaging).

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Lutheran Heritage Village-Livonia, and other cases.[15] This general principle applies to employer rules prohibiting abusive communications in the email context.[16]

E. WHERE EMPLOYEES HAVE ACCESS TO EMAIL DURING WORK HOURS, THEY CAN BE PROHIBITED FROM ENGAGING IN SOLICITATION; THEY CANNOT BE PROHIBITED FROM WORK RELATED COMMUNICATIONS CONCERNING WORKING CONDITIONS WHERE THEY OTHERWISE HAVE ACCESS TO EMAIL.

This principle that employers can limit use of the email to specific business purposes and prohibit solicitation during working hours, must, however, recognize the equally important rule that employers cannot prohibit employees from talking about and communicating for purposes of mutual aid or protection when the email is generally available unless the email use is restricted to a business use unrelated to those issues. It is well settled that rules prohibiting employees' discussion of their wages, hours, or other terms and conditions of employment violate Section 8(a)(1) of the Act. *Mcpc, Inc.*, 360 NLRB No. 39 (2014); *Flex Frac Logistics*, 358 NLRB No. 127 at * 1-2 (2012), *enforced*, 746 F.3d 205 (5th Cir. 2014); *Costco Wholesale*, 358 NLRB No. 106 at p 2-3; *Flamingo Hilton Laughlin*, 330 NLRB 287, 292 (1999); *Koronis Parts*, 324 NLRB 675, 686, 694 (1997). *See also Scientific-Atlanta, Inc.*, 278 NLRB 622, 624-625 (1966) (wages are a "vital term and condition of employment," "probably the most critical element in employment" and "the grist on which concerted activity feeds").

It is important here to distinguish between solicitation and communication.[17] The Board has historically drawn an important distinction between solicitation and mere talking. *Conagra Foods, Inc.*, 361 NLRB No. 113 (2014). See also Fremont *Medical Center*, 357 NLRB No. 158 fn. 9 (2011). In *W. W. Grainger, Inc.*, 229 NLRB 161, 166 (1977), *enfd*, 582 F.2d 1118 (7th Cir. 1978), the Board noted that, "It should be clear that 'solicitation' for a union is not the same thing as talking about a union or a union meeting or whether a union is good or bad." *See*

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[15] Charging Party in its Brief in Support of Exceptions asked the Board to overrule *Lutheran Heritage Village-Livonia.* We maintain that position here and preserve it for Exceptions.

[16] Purple maintains such rules which are not challenged. Jt. Ex 1, p 30-31.

[17] Purple maintains an unchallenged rule prohibiting solicitation "during working time for any purpose." Jt. Ex.1, p 32.

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Powellton Coal Co., 354 NLRB 419 (2009), incorporated by reference in 355 NLRB 407 (2010) (employer unlawfully prohibited employees from engaging in conversations about the union); "An employer may not restrict union related conversations while permitting conversations relating to other topics." *Rockline Industries*, 341 NLRB 287, 293 (2004); *Jensen Enterprises*, 339 NLRB 877, 878 (2003). Thus, an employer cannot turn a valid no-solicitation rule into a no-talking rule. *Starbucks Corp.*, 354 NLRB 876, 891-93 (2009); *Emergency One, Inc.*, 306 NLRB 800 (1992) (respondent unlawfully restricted conversations about the union during work time while permitting other conversations including those about non-work matters); *ITT Industries*, 331 NLRB 4 (2000) (respondent's instruction not to engage in any discussion of the union with any employee unlawful where employees were, notwithstanding rule in employee handbook prohibiting all solicitations during working time, allowed to engage in discussions and solicitation on the production floor). In *Wal-Mart Stores*, 340 NLRB 637, 639 (2003), *enf'd in relevant part*, 400 F.3d 1093 (8th Cir. 2005), the Board found that the wearing of union insignia was not solicitation and would not justify the application of a no solicitation rule. The Board's recent Decision in *Conagra Foods, Inc*., *supra*, reaffirms this and applies to this case.

Since the first email case in 1993, the Board has recognized that employees, once they have access to email, use it for work related purposes, including communicating issues about working conditions. *E. I. Du Pont De Nemours & Co*., 311 NLRB 893, 9191 (1993).

Thus, as long as an employer such as Purple allows any communication during work time about work related matters, it cannot prohibit such communications when they involve issues concerning the workplace, including how those conditions might be improved. Furthermore, so long as the employer uses the email system to communicate about wages, hours and working conditions or matters of mutual aid and protection, it cannot prohibit employees from doing the same. And further, where any employer such as Purple allows use of email for personal purposes unrelated to working conditions, it cannot prohibit communications about work related conditions. Again, however, the employer could limit email use to defined uses relating to production. And, further, even to workplace issues, it could make email available to communicate only with employees. Once the employer allows employee personal use among

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employees, it cannot prohibit use about workplace issues. Here Purple has offered no evidence that employee communication with create any interruption of service. Cf. *Conagra Foods, Inc.*, 361 NLRB No. 113 at * 3 (2014)(**"**Nor does a momentary interruption in work, or even a risk of interruption, subject employees to discipline for conveying such union-related information."

Here, Purple uses email for human resources communications, and this is the norm with employers who have an intranet or email on the internet. (Tr. 64, 132. Resp.. Ex. 10 [key metric adjustment memo to all video interpreters] and Ch. P. Ex 7 [announcing bonus].) Where email is used for such purposes, employees have a right to communicate with management or other employees about such issues where, again, employees are given access to use of the email. *Timekeeping Sys., Inc.*, 323 NLRB 244 (1997) illustrates this principle from a case that arose almost 20 years ago. There, the employer used its email system to communicate with employees about changes in vacation and incentive bonus. One employee objected to the change in the vacation policy and offered a detailed criticism of the change to the employer and copied the other employees. There was no restriction imposed on employees that limited communication on the email system. When the employee wouldn't retract his criticism, he was fired. The Board applied traditional principles and found the conduct was concerted, protected and for mutual aid or protection. All of the conduct was on work time. These were not personal communications.

The Board's recent decision in *California Institute of Technology*, 360 NLRB No. 63 (2014), illustrates this. Employees used the email system to engage in a vigorous and sharp debate about a workplace issue involving privacy. The employees sent mass emails to other employees and to outsiders, apparently on work time, concerning the subject of privacy and were disciplined for their conduct. The Board had no trouble finding the conduct did not lose the protection of the Act. The Board described the testimony of the director of Human Resources:

> She aptly described these communications as being "part of the fabric of every working group in every day work operations." She continued: "[T]hat is part of, in a work group, what people inform each other about."

Id. at p. 14.

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This demonstrates our point that once access is allowed to email for email communications among employees, employees are allowed to use it for purposes related to mutual aid and protection. The employer cannot then discipline employees who use it to debate workplace issues. Resp. Exs 8 and 4.

This is forcefully illustrated in *Food Services of America*, 360 NLRB No. 63 (2014). The Board sustained the termination of one discriminatee because he used the company email to disclose "confidential business information." *Id* at n. 4. Note that the disclosure was "confidential" information, not just business information. On the other hand, the email and instant message exchanges between discriminatee Rubio and others was protected activity. From the entire context it was clear that the employees were using company communications systems and company email.[18] Food Services condoned this use and only terminated Mr. Rubio when it objected to his instant messaging about job security. In summary, an employer can promulgate clear rules limiting company communications systems to specific business purposes. It can similarly limit solicitation for union or protected activity to non-work time. But once it allows access to the email system without clear business related limits, which are strictly enforced, it cannot prohibit communications about wages hours and working conditions for mutual aid or protection.

The Board's Decision in *Hitachi Capital America Corp*, 361 NLRB No. 19 (2014) support this. *Hitachi* serves as another example where an employee used the electronic communication system (email) to communicate on working conditions during work time where she had general access to that system. The email exchange was in response to the employer's implementation of a new policy concerning inclement weather to which the discriminatee objected. The employer used the email system to communicate on work related issues. The exchanges occurred during work time throughout the day of February 3, 2011 beginning at 9:15 and ending at 2:55. Other employees used the email system to comment on working conditions. Member Miscimarra notes in footnote 3 of his dissent that the discriminatee could have used the

[18] Many of the emails were forwarded from the company email system. *Id*. at p. 14.

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email to respond further. He furthermore concurs that her emails were protected concerted activity. See note 7. This demonstrates the accepted usage of company electronic communications systems by employers and employees of issues related to working conditions.

Most recently the Board affirmed a finding of a violation of Section 8(a)(1) where the employer disciplined employees who used email for protected concerted activity on work time. *Grand Canyon Education, Inc*., 362 NLRB No. 13 (2015), *reaffiming*, 359 NLRB No. 164 (2013)(victim of *Noel Canning*) . There is no way to escape the conclusion that email use is common place during work time and the use of it for communication about work place issues is protected.

Of course, the employer has the right to limit communications to ensure productivity and other substantial business needs. Just like it can make sure the VIs respond promptly to any incoming call, it can ensure anyone with an employer communications service or device is not distracted from his or her work task. Purple offered no evidence that email use by employees has interfered with productivity. Just like employers can limit the time workers use to spend at the water cooler, they can limit communications, as long as the limit is non-discriminatory.

F. THE REGISTER-GUARD RULE SHOULD BE DISCARDED.

The *Register-Guard* Board, confronting the same question presented here, rejected the applicability of *Republic Aviation* to employee use of a company email system for Section 7-protected solicitation on the ground that "[a]n employer has a 'basic property right' to 'regulate and restrict employee use of company property.'" *Register-Guard*, 351 NLRB 1110, 1114 (2007) (quoting *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-64 (6th Cir. 1983)). As we have already shown, however, while an employer may exclude employees completely from using a company email system for non-work communications altogether, once it permits employees to use that system for work purposes, "it is the employer's *management* interests rather than its property interests that primarily are implicated." *Eastex*, 437 U.S. at 573 (emphasis added). At that point, *Republic Aviation* – with its focus on the right of employees "effectively to communicate with one another regarding self-organization at the job site" (*Beth Israel Hospital*, 437 U.S. at 491) – fully applies.

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The cases relied upon by the *Register-Guard* Board for its conclusion that employees have "no statutory right" to use "employer-owned property – such as bulletin boards, telephones, and televisions – for Section 7 communications," (351 NLRB at 1114) follow the rule set forth in *Eastex*.[19] As those cases make clear:

> When an employer singles out union activity as its only restriction on the private use of company [property], it is not acting to preserve the use of the [property] for company business. It is interfering with union activity, and such interference constitutes a violation of Section 8(a)(1) of the Act.

Churchill's Supermarkets, Inc., 285 NLRB 138, 156 (1987).

Contrary to the conclusion drawn by the *Register-Guard* Board, the cases cited in that decision actually demonstrate that the Board has applied *Republic Aviation*'s interference analytic framework to employee use of a wide range of employer equipment for Section 7-protected communications, including bulletin boards (*Eaton Tech., Inc.*, 322 NLRB 848, 853 (1997) ("when an employer permits . . . employees . . . to post personal . . . notices on its bulletin boards, the employees' . . . right to use the bulletin board receives the protection of the Act")), telephones (*Union Carbide Corp.*, 259 NLRB 974, 980 (1981) ("once [the employer] grants the employees the privilege of occasional personal use of the telephone during work time, . . . it could not lawfully exclude the Union as a subject of discussion"), *see also Churchill's Supermarkets*, 285 NLRB at 155-56 (1987) (same)), and photocopy machines (*Champion Int'l Corp.*, 303 NLRB 102, 109 (1991) ("An employer may not invoke rules designed to protect its property from unwarranted use in furtherance of pro-union activities while, at the same time,

[19] The *Register-Guard* Board relied on *Mid-Mountain Foods*, 332 NLRB 229 (2000). 351 NLRB at 114. There was no showing that the employer had permitted any kind of videos to be shown on a company provided video player. Thus, the Board's conclusion that "the Union's employee supporters do not have a statutory right to show the video . . . since it has not been established that the Respondent permitted employees to show other videos," (*Id.* at 230) was arguably correct**.**

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freely permit such use for non business related reasons")).[20] Based on this precedent, the Board should apply *Republic Aviation*'s analytic framework to employee use of a company email system for Section 7-protected communications as well.[21] Thus, Suzi Prozanski's May 4 email was protected because the Register-Guard's discipline interfered with her Section 7 right to communicate about workplace issues

Although the Board declined in *Purple* to expressly overrule it, see footnote 13, the Board should do so now. Here it is particularly appropriate since the employer tolerated emails which were anti-union and thus anti-organization. Moreover the rule allows personal emails unless they are "uninvited email of a personal nature." See Resp. Exs. 8 and 4. Moreover the rule allows personal emails unless they are "uninvited email of a personal nature." The record thus compels a conclusion that *Register-Guard* must go. *Purple Communications* effectively overruled *Registe- Guard* and the ALJ should so find. The ALJ should thus find that the rule unlawfully discriminates.

G. THE STRONG POLICY REASONS TO ADOPT THE RULES ADVOCATED HEREIN

There are strong policy-based reasons to adopt the rule urged here pursuant to the Board's responsibility "to formulate and adjust national labor policy to conform to the realities of industrial life." *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 693 (1980).

First, and foremost, email and other forms of electronic communication are ubiquitous in most all modern workplaces. Other forms of communication systems, both hardware, text messaging, applications, RFID, social media and other forms are everywhere, sometimes in

[20] Some of the cases cited refer to employer discrimination in stating the basic *Eastex* rule. *See, e.g.*, *Champion Int'l Corp.*, 303 NLRB at 109 ("an employer may not use that basic right [to regulate and restrict employee use of company property] to discriminatorily restrict pro-union activities"). However, it is clear from the context of these statements that the Board does not refer to anti-union animus, but rather, as in *Republic Aviation* itself, to discrimination in the sense of an "unreasonable impediment to self-organization." 324 U.S. at 803 n.10. As we have explained in the text, we strongly suggest that the Board avoid this use of the term "discrimination" in deciding this and future cases that rest on the rationale set forth in *Republic Aviation* and its progeny.

[21] Discriminatory enforcement of otherwise valid rules would constitute also a violation of 8(a)(3). *Guard Publishing Co. v. NLRB*, 571 F. 3d 53 (D. C. Cir 2009)

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multiple formats. In many workplaces, then, electronic communication has become an important "avenue[] of communication open to [employees] . . . for their right to self-organization." *LeTourneau Co.*, 54 NLRB at 1260.

In addition, "[r]apid changes in the dynamics of communication and information transmission are evident, not just in the technology itself, but in what society accepts as proper behavior" regarding the use of email. *City of Ontario v. Quon*, 560 U.S. 746, 759 (2010). In particular, "[m]any employers expect or at least tolerate personal use of [electronic communications] equipment by employees because it often increases worker efficiency." *Ibid.* There is a movement among some employers to encourage employees to "bring their own devices' (BYOD), which poses many issues for employers and employees. But we also concede that there are many employees who do not currently use email, at all, for work. Many who do not have email use may have other forms of employer communication equipment. There are many forms that allow limited communications, sometimes only one way (employer to employee), but sometimes employee to employer, employee to other employee or employee to non-employee. This rapid change is equally illustrated by Purple's website advertising new communications services for its clientele. Email and related communications, such as text messaging, will evolve and change.

One federal district court has recently recognized this: "The Court takes judicial notice of the fact that it is a customary practice for employees to use their business emails and computers for both personal as well as business purposes, but merely using a work computer or email address does not implicate the employer's involvement in the employee's personal business, let alone that the employer purposefully directed the activity." *Farkas v. Rich Coast Corp.*, 2014 WL 550594 (W.D. Pa. Feb. 11, 2014). *See also*, *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300, 307 (2010) ("In the modern workplace, for example, occasional, personal use of the Internet is commonplace"). *See also*, *Schill v. Wis. Rapids Sch. Dist.*, 786 N.W.2d 177, 182-83 (Wis. 2010).

The speed and efficiency of email communication, as well as the ability of many employees to access a work email account from a mobile electronic device or a home computer,

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makes email communication, if anything, less disruptive than face-to-face communication at the workplace. In addition, unlike the use of a company bulletin board for Section 7-protected communications – where employee non-work use may crowd out the employer's use of its property for work-related communications – normal employee use of a company email system for non-work communications is highly unlikely to interfere with the simultaneous use of that system for work tasks. *Cf.*, *Intel Corp.*, 71 F.3d at 303-04 (no evidence of email messages slowing or impairing employer's email system even where former employee sent thousands of messages simultaneously) and *Cal. Inst. of Tech.*, supra. To the extent that certain *forms* of employee use of a company email system potentially could interfere with an employer's use of that system for work purposes – such as the sending of large attachments that might slow the employer's email system or spamming that might create such a distraction as to interfere with employees' use of the email system for work purposes – an employer could lawfully place limits on such forms of use of its system, as long as it does so in a non-discriminatory manner.

Thus, because "[f]lexible, common-sense workplace policies that allow occasional personal use of email are in line with the mainstream of professional practice" (*Schill*, 786 N.W.2d at 196), and because such use does not create additional cost for an employer or interfere with the employer's property rights, the Board's *Register-Guard* rule, permitting an employer to lawfully prohibit *all* employee use of email for Section 7 purposes is far out of step with the "realities of industrial life" (*Yeshiva Univ.*, 444 U.S. at 693), and represents an unwarranted restriction on the ability of employees to "effectively . . . communicate with one another regarding self-organization at the jobsite" (*Beth Israel Hosp.*, 437 U.S. at 491).

The practicalities of the presumption we advocate should be readily apparent.

The employer such as Purple can choose to make any electronic communications device available to any given employee or group of employees. It is a managerial decision. There are various communications systems that it can choose from. For example, it can select a voice activated or text messaging system that permits only one way communication or communication with a designated person, such as dispatcher or supervisor. It can control the recipients of email. It can preclude all attachments or links. It can limit the length of the email message. So long as

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there is a clearly stated business purpose, and it is strictly enforced and it is not discriminatory, the employer has a wide range of tools to control the use of its email systems.

Here, Purple evidences this flexibility. Many employers prohibit use of employer phones for personal use, meaning, again, for communication unrelated to work. Purple, however, allows such use on company phones and employee cell phones so long as each call is limited to 3 minutes. (Jt. Ex. 1, p 29.) It allows use of relay services "to make a personal call, [the employee] is entitled to use relay in the normal course of your business." (Jt. Ex. 1, p 33.)

Employers, furthermore, have the ability to monitor use of these emails in ways that did not apply when the Board formulated its rules 50 or more years ago.[22] An employer can monitor every aspect of electronic communications. As in many other circumstances where employee use of communication interferes with work, it can take appropriate action. For example, if VIs are allowed to read a book, but the FCC requires each call be answered with 120 seconds, Purple can easily monitor each VI to ensure that he or she was available to answer each call promptly when each call appeared. Purple can tell whether the VI was logged into a call, or waiting, and how long before he or she answered the next waiting call. Thus, productivity can easily be measured and enforced. Although these issues are not directly before the Board, they serve to illustrate the practicalities of the rule we propose.

H. THE AVAILABILITY OF EMPLOYEE CELL PHONES, PERSONAL DEVICES, SOCIAL MEDIA SITES AND PERSONAL EMAIL DOES NOT AFFECT THE PRESUMPTION URGED IN THIS BRIEF.

The Supreme Court has clearly held that the availability of alternative means of employee-to-employee communication is not relevant in determining the nature and strength of the Section 7 right. *See Beth Israel*, 437 U.S. at 504-05; *Babcock & Wilcox*, 351 U.S. at 112-13. Here, the employees are disbursed among 16 call centers. The inability of some employees to communicate with fellow workers, other than through email, demonstrates the critical nature of

[22] *Mcpc, Inc.*, 360 NLRB No. 39. * 7- 8, n. 13 (2014) (audit of computer used by employee demonstrated he did have inappropriate access to data). Employers will have to observe federal law, which can limit access to email accounts and other electronic media. *Konop v. Hawaiian Airlines, Inc*., 302 F.3d 868, 876- 880 (9th Cir. 2002).

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this Section 7 right. Thus, availability of other forms of communication is not a relevant issue.[23] The Board so ruled in *Purple Communications*. See footnote 62. The employer has made no effort to establish any factual record that there are any other available alternatives.

I. THESE PRINCIPLES SHOULD APPLY TO ALL FORMS OF ELECTRONIC COMMUNICAGIONS SYSTEMS

It is not possible to predict all forms of communication systems that will be available and used by employers or employees. In the future, there will be many forms of communication that are only being developed. For example, there has been recent publicity about implanting medical devices that will send signals regarding medical history. There was also, in the development stage, wearable devices that will monitor work activity. Could the employee wear his or her own device in order to monitor his or her own activity to provide information to other employees? Could the employee transmit safety or work performance data to a union concurrently with transmitting it to the employer? Could the employee use his own device to download and email company information that is related to wages, hours and working conditions? These questions will arise in the future. However, the basic statutory right of employees to engage in communication in the workplace established by Section 7 will govern these questions. What is certain is that efficient industry and productive work requires communication. Employers will have to accommodate their need to allow employees to communicate through electronic means with the right of employees to engage in Section 7-protected communications. Nothing in the record suggests *Purple* cannot do this.

J. REMEDY

The remedy in this case should include the following:

(1) Intranet postings;

(2) Mailing of the Board Notice to all employees and former employees;

[23] The Board and the ALJ need not reach the issue of access to email by non-employees. The right of non- employees to communicate, solicit or send attachments is governed by state or federal law. *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992). *See also Intel Corp.,* 71 F.3d 296, and CAN SPAM, 15 U.S. C. section 7701 *et seq.*

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(3) Mailing of the Board decision where the employees will be able to understand the reasons for the Board remedy;

(4) Appropriate language in the notice in which the employer acknowledges its unfair labor practice such as:

> We have been found to have maintained unlawful rules restricting the use of employee email for protected concerted activity and union activity. We have agreed to rescind those rules and to allow you to use the email for protected concerted Union activity during work and non-work times so long as it doesn't interfere directly with your job duties at the time;

(5) Notice posting for the period of time from when the violation began until the notice is actually posted;

(6) The Posting should be nationwide at all facilities;

(7) The employer should email on a regular basis the notice of the Board Decision to each employee since it uses email system for distribution of employment related matters;

(9) Because the employer maintains office meetings it should be required to read and discuss the notice at office meetings.

(10) The employees should be afforded work time to read the Board's Decision and the Notice.

(11) The employer should allow 5 hours of time for employees to communicate about Section 7 matters to make up for the time which they have lost for such use by the maintenance of the unlawful rule.

(12) Post the Notice on its Website with a link to the Decision on the Board's website..

(13) Notify the Federal Communications Commissioner which is its principal source of funding of its illegal conduct. Order the Purple to reimburse the FCC for any fees which has spent in committing unfair labor practices and defending this litigation. .

IV. CONCLUSION

For the reasons suggested above, the Communications Workers of America urges the ALJ find that Purple allows the VI's to use email during work time for protected concerted activities by communicating about work related issues. The record establishes such use and the

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employer declined to offer any evidence to substantiate any limitation. As a result there is no business justification to restrict such use during work or non-work times. Purple has not implemented any rule limiting such use. Although it may be possible to implement such a rule limiting the use during work time when VI's are interpreting with a client, it has not done so.[24]

On the basis of these three undisputed facts – routine employee use of company email to communicate with one another during work time and unlimited employee access to company email on nonwork time including in break rooms and from home, and the fact that no employee was ever disciplined for nonbusiness use of company email – the ALJ should draw the reasonable inference that employee use of Purple Communications' email system was routine and tolerated by the company.

Employees can use employer email systems, including related communications systems, such as text messaging, for protected concerted activity concerning mutual aid or protection or Union activity unless the employer adopts a clear rule limiting the email system to a specific business purpose and strictly enforces that rule which Purple has not done. Nor has Purple prohibited all access to its email system. Here the employees have access to email during work time. Purple cannot foreclose them from accessing email during non-work time and in this case during work time. This reflects the modern day use of electronic communication systems as found by the Board in *Purple Communications*. It protects and properly balances the rights of employers and employees.

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[24] And as noted above the ALJ does not need to address the issue of whether this would be special circumstances since the employer has not made this assertion. Nor has the employer adopted any rule defining when email and electronic communications devices cannot be used.

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Dated this 10th day of March, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On March 10, 2015, I served the following documents in the manner described below:

CHARGING PARTY/PETITIONER'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE ON REMAND

☑	BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kshaw@unioncounsel.net to the email addresses set forth below.

☑ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kshaw@unioncounsel.net to the email addresses set forth below.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 10, 2015, at Alameda, California.

/s/ Katrina Shaw
Katrina Shaw

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